EMPLOYMENT TRIBUNALS

Claimant: **Mr L Mbuisa**

Respondent: **Blue Sky Enabling Limited**

Heard at: **Bristol** **On:** **10 to 13 August 2020**

Before: **Employment Judge O'Rourke**
Members: Ms Ramsaran
Ms Maidment

Representation:

Claimant: **in person**
Respondent: **Mr Johnston - Counsel**

Wriitten reasons having been requested subsequent to the Hearing, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The Claimant was employed by the Respondent, as a 'Live-in Enabler'/support worker, caring for the needs of disabled people ('service-users'), for approximately four and a half months, until the termination of his employment, with effect 6 June 2018, his dismissal having been notified on 9 May 2018. The Claimant brought claims of race, religion and disability discrimination, unfair dismissal, protected disclosure, automatic unfair dismissal and breach of contract. There have been four case management hearings in this matter, at one of which, on 14 June 2019, he agreed that his claims would be limited to the matters set out below.

2. The outcome of the preliminary hearing was set out in a detailed, comprehensive case management summary [54L-N], which it is not our intention to rehearse here, but, in summary, the claims were:

   (1) Direct Discrimination – the Claimant asserted that by being dismissed, having his hours of work reduced and the Respondent having failed to take seriously a complaint he brought of racial abuse by a service user, he had been less favourably treated than a hypothetical comparator,

namely another support worker, who did not share his protected characteristic of race. (The Claimant is a black South African.)

(2) Harassment. The Claimant asserted that he had been subject to racial harassment by a service user ('KR'). The Respondent did not dispute his report of such harassment, but did not consider itself liable for KR's actions and in any event took reasonable action to prevent a recurrence.

(3) Victimisation. The Respondent accepted that by having made the complaint against KR, the Claimant had done a protected act. They did not accept, however, as asserted by the Claimant that his dismissal, reduction in working hours and not being paid for night work (the latter of which the Respondent stated was not in any event a contractual entitlement) had anything to do with the protected act.

(4) Automatic Unfair Dismissal. The Claimant asserted, subject to either s.100 or 104 Employment Rights Act 1996 that his raising of a health and safety concern as to the existence of a lock between his bedroom and that of the rest of another service user's residence ('AJ') was the reason or principal reason for his dismissal. The Respondent denies any such report from him, or even if made that it led to his dismissal. The Respondent also points out that in any event, the Claimant states that the principal reason for his dismissal was in fact his race.

(5) Failure to make Reasonable Adjustments (ss.20-22). This claim related to a claimed disability of the Claimant in relation to a back problem and depression. He said that a PCP of requiring him to be available to provide necessary care to a service user, during the night, if they woke up (which PCP the Respondent conceded) affected his ability to take medication for his depression. Further, he alleged that a PCP of requiring him to assist AJ, who was morbidly obese, into and out of bed and in washing him, put him at a substantial disadvantage, due to his back problem. The Respondent did not accept that such a PCP existed. There was no requirement to assist AJ into and out of bed, or into or out of a bath. The Respondent disputed, in any event that the Claimant was disabled at the relevant time, but that even if he was, the Respondent had no knowledge of any such disability or substantial disadvantage.

(6) Notice Pay. The Claimant asserts that having been dismissed on four weeks' notice, he is entitled to four weeks' notice pay, but the Respondent states that while the Claimant 'worked' out his notice, they had no work available for him to do and as he was on a zero-hours' contract, they had no obligation to provide him with such work.

(7) Holiday Pay. The Claimant stated that he was entitled to ten days' holiday pay, not the seven he was paid.

(8) Night Pay. The Claimant considered that he should have been paid for his live-in 'on-call' night duties. The Respondent states that he has no contractual entitlement to such payment and refers to the Court of Appeal judgment in **Tomlinson-Blake v Mencap**, currently on appeal

to the Supreme Court. That element of the Claimant's claim, at his request, is stayed, pending the judgment of the Supreme Court.

3. Preliminary Matters. On the first morning of the Hearing, the Claimant requested additional disclosure of the 'daily care notes' appropriate to AJ. He was asked why, despite having had a copy of the agreed bundle for at least several months, he had not previously thought to make this request. He stated that he had, but that it had not been responded to. The Respondent denied any such request and the Claimant was unable to explain why he did not subsequently apply to the Tribunal for a specific order. When asked for the relevance of these notes, he said that they would reference his purchase and fitting of a lock to his bedroom door (in relation to his claim of automatic unfair dismissal). Accordingly, therefore, the Respondent was ordered to examine these notes and disclose any such reference. We were informed on the second day that a search having been carried out, no such reference could be found.

The Law

4. We were referred to the relevant sections of the Equality Act 2010.

5. Mr Johnston referred us to the **Mencap** case and also the long-established case of **Madarassy**, as to the burden of proof in discrimination cases.

The Facts

6. We heard evidence from the Claimant and on behalf of the Respondent, from Mrs Shelley Saxon, the CEO of the Respondent and responsible for the Claimant's dismissal.

7. Events. An uncontentious chronology follows:

   (1) 13 November 2017 – the Claimant is interviewed by Mrs Saxon and her husband [76-81]. In the notes, it is recorded that he mentioned that he had '*healed from injury – no back problem or issues that affect ability to work'* and Mr Saxon recorded '*no lasting back problems'*.

   (2) 18 January 2018 – a manager writes to the Claimant [84] stating that '*you will have been sent emails regarding the courses by our training company'* and confirmed the four courses that '*need to be completed'* and are '*mandatory',* providing a deadline of 15 February. Subsequently, it was common ground that the Claimant had already completed one of those courses, medication management, but the remaining three still needed to be done.

   (3) 25 January 2018 (all dates hereafter 2018) – Claimant signs his contract of employment [85-86], which records, under hours of work that '*you have no guaranteed hours of work'*. It also states that his probationary period is for three months and that he '*will be expected to complete all specified initial training …'*.

(4) 26 January – the Claimant completes a medical fitness declaration form [91-94] in which the following is recorded. In response to the question '*have you ever had … depression/mental illness or nervous breakdown?'*, he ticked '*no*' and in response to the same question for '*back and or neck injury problems or pain?'* he ticked '*yes*' and stated '*suffered injury at work and on medication/painkillers'*.

(5) Following some period of shadowing of AJ's previous carer, a Mr Wooley, the Claimant commenced live-in care of AJ, working two weeks on and two off (unpaid).

(6) 29 January – the Claimant had commenced work subject to a 'daily average hour agreement', which set his weekly average hours at 85.5, giving him, excluding breaks, a daily average of fourteen hours, for each of which he would be paid [455]. That agreement was superseded by another [456], in which his weekly average was increased to 95 hours, to reflect, Mrs Saxon said, an enhanced care requirement for AJ.

(7) 31 January – the Claimant emailed Mrs Saxon [95] in respect of AJ, mentioning that '*getting him into the bath has become a health risk as he struggles to lift his legs up, into and out of bath.'*. Mrs Saxon responds the same day stating that an occupational therapist would carry out a full assessment. Both witnesses agreed that as an alternative, AJ would be standing hand-washed, pending, Mrs Saxon said, the fitting of a walk-in shower.

(8) 11 and 28 February – Mrs Saxon writes to the Claimant [97B, 98H] complimenting him on his performance and having '*made an excellent start'* and '*doing a brilliant job in keeping AJ calm*'.

(9) 5 March – Mrs Saxon emailed the Claimant [99] stating that the Claimant had not yet logged into the on-line training system, to access the required courses and arranged a supervision period. He replies the same day [99A], saying that he would complete them by '*next week'*.

(10) 12 March – Mrs Saxon emails the Claimant [100], confirming his agreement to temporarily care for another service user, KR, for at least a week, during his two week 'off work' period. She attaches to that email a very detailed care plan and incident log for KR, indicating that KR had severe behavioural problems [100A to 100AA]. The Claimant said in response that he would not be available to provide care for a second week [101], but in fact did so.

(11) 20 March. The Claimant emails Mrs Saxon, making a formal complaint against KR, stating that he racially abused him, using terms as set out in that email and attaching incident reports [110]. Mrs Saxon arranged a meeting with social services and the police to discuss KR's behaviour generally [111], for 22 March, emailing those bodies on 21 March and attaching copies of the Claimant's incident reports. She did not copy the Claimant into that email. She said she phoned the Claimant after the meeting to inform him that the police would not take action unless

he made a personal complaint. The Claimant, as stated, did care for KR for another week, during which there were no similar incidents.

(12) 27 March – Mrs Saxon again emailed the Claimant [113], in respect of the training, stating that he had still not completed it, or even logged into the system.

(13) 29 March – at a supervision meeting, the issue is again raised [114] and Mrs Saxon extended the deadline to 12 April. The Claimant is recorded as saying that he would do the training in his next two-week break period.

(14) 12 April – the Claimant emailed Mrs Saxon [116D] stating that he had attempted to log in, but there was no training showing allocated to him and added that '*as far as I am aware, my training is all up to date – a total of thirty courses and an expiry date of September 18*'. Another manager sent him further guidance as to how to log in, to include a hyperlink and stressing that the courses were very overdue and that he risked disciplinary proceedings, again extending the deadline to 26 April.

(15) 24 April – the Claimant files an incident report stating that AJ had woken him during the night, having entered his room and had been standing naked beside the bed, which he considered frightening and threatening [120]. Another report of the same day refers to AJ threatening to kill him [121].

(16) 3 May – Mrs Saxon holds a supervision meeting with the Claimant [129-131]. She refers again to the Claimant still having not logged on to the training system. He said he still had difficulties in doing so and she then sat down with him and he successfully logged in. She recorded that the Claimant then became aggressive (the Claimant states he was 'upset') with the implication that he was a liar and he threatened to leave his shift immediately, with the Claimant stating that he offered to resign. She allocated him a further three additional courses and recorded that '*Lee will have three weeks before he returns on shift to complete all the training'*. The notes also record difficulties with AJ's care, in particular his diet, with Mrs Saxon suggesting that the Claimant's communication with AJ could be improved and the Claimant stating AJ reacting differently with other carers. She recorded that '*Lee needs to develop a lighter and more positive approach'*. She also announced that the Claimant's shifts would be reduced from two to one week a month, to '*give them* (he and AJ) *a break from each other'*.

(17) 4 May – Mrs Saxon emailed the Claimant [132], setting the deadline of 26 May for completion of both the pre-existing courses and the three additional ones.

(18) 9 May – Mrs Saxon held a review meeting, in respect of the Claimant, with another manager [134] and concluded that the Claimant was underperforming, both in respect of his relationship with AJ, his reporting of incidents generally and his compliance with training needs.

She accordingly terminated his employment the same day, by letter [133], on four weeks' notice.

(19) 10 and 23 May- the Claimant complains as to his dismissal, threatening these proceedings [137]. He also asserts [138A] that the Respondent did not treat his complaint in respect of KR as a grievance.

(20) 25 May – Mrs Saxon acknowledges a grievance from the Claimant [141], in respect of unfair dismissal and lack of management support, offering a grievance hearing on 31 May. The Claimant responded on 29 May stating that effectively he saw no point in attending, as he'd already been dismissed [142]. The hearing proceeded in his absence [147], dismissing the grievance.

8. Direct Discrimination on grounds of Race. The Claimant said that he had suffered the following acts of detriment, his dismissal, the reduction in his hours of work and a failure by the Respondent to properly address his concerns about KR and other matters.

(1) We find that the dismissal was not less favourable treatment on the grounds of race, for the following reasons:

i. It is for the Claimant to satisfy us, on the balance of probabilities that he has suffered less favourable treatment than a comparator, in order for the initial burden of proof to shift to the Respondent to provide an alternative non-discriminatory reason. However, the Claimant has failed completely to do so. He provided no evidence, beyond his suspicion that Mrs Saxon would not have treated a white employee in that way, to support his contention of less favourable treatment. She provided a list of employees, some of whom she said were white, who had been dismissed in similar circumstances, in particular for failing to do mandatory training. The Claimant has had that list now for at least several months, but not sought further disclosure of the background details of those employees and was therefore in no position to challenge her evidence on this point. Generally, we found Mrs Saxon to be a credible witness – her evidence was expansive and straightforward and where she had made errors she was prepared to admit them. In contrast, however, we considered the Claimant to be a less reliable witness. There were several occasions when he gave contradictory or evasive evidence, but in the most egregious incident, when challenged as to whether he had seen KR's care plan and incident log, he categorically denied doing so, despite it being pointed out that the covering email (which he had seen) listed those documents in the attachment line and specifically referred to them in the body of the email. On being challenged a couple of times on this point, he became agitated and when accused of lying by Mr Johnston, said that he was only saying that because he (the Claimant) was black. At that point, Mrs Saxon alerted the Tribunal to the fact that she had the original email on her laptop and offered to show it to us and the Claimant. A break was ordered, for her to do so and on return,

the Claimant immediately admitted that he had in fact seen the attachments, stating that he had viewed them on his own phone. He denied that the threat of Mrs Saxon displaying the email was the motivation for the admission. On prompting from the Tribunal, he apologised to Mr Johnston for his outburst. We, however, do not accept that explanation and consider his original evidence on this point to be clearly untrue and reflecting very poorly on his credibility generally.

ii. It is clear to us that Mrs Saxon 'jumped the gun' in dismissing the Claimant. Her notes of the supervision meeting and subsequent email are at very least unclear as to the revised deadline and we accept that the Claimant could reasonably have considered that it was, in fact, for all six courses (the three original ones and the additional three), 26 May, not, as Mrs Saxon asserted, in respect of the original three courses, '*immediately*'. We note her explanation that in her mind she considered that to be the case, but she accepted that her email indicated otherwise. However, we do not consider that the decision to dismiss on 9 May was motivated by the Claimant's race, but instead by her frustration at the Claimant's continued and repeated failure to engage with his training needs (he had still by that date still not logged into the system) and also his behaviour at the review meeting, with her stated concerns as to his communication skills and his reaction to criticism (although the latter is not stated in the letter of dismissal).

iii. While the Claimant considered that the Respondent's failure to follow the ACAS Code in dismissing him indicated discrimination, we disagree. Mrs Saxon made it clear that the Claimant was not being disciplined, but being dismissed for failing to meet the requirements of his probationary period and that therefore application of the Code was unnecessary. In any event, the Claimant did not have the requisite two years' service to bring a claim of unfair dismissal and therefore there is no sanction on the Respondent for failing to follow the Code. While he had exceeded his probationary period by a couple of weeks, his contract permitted its extension, if he failed to comply with training, which he had. He was still, therefore, in his probationary period. As to his non-compliance with the training requirements, we do not accept the excuses he then and now offered, particularly bearing in mind the number and seriousness of the warnings he received, his lack of positive action on his part, despite several revisions of the deadline, his implied comments as to not really needing to do this training and finally, our general view as to his credibility.

(2) Turning to the reduction in the Claimant's hours, firstly, there is no contractual right to fixed hours and secondly it is clear from the evidence from both witnesses and in the documents (based on the Claimant's own incident reports) that he was finding it difficult to deal with AJ. Clearly, reducing an employee's hours of work is a detriment, but again we do

not consider that this was less favourable treatment on grounds of race. Mrs Saxon was able to provide a logical reason for the reduction in hours, i.e. giving each party a break from the other and she said that due to the Claimant's failure to complete training and lack of other service users, she had no alternative work for him. We have no reason to doubt that explanation.

(3) In respect of the alleged failure to deal with the complaint about KR, it is not the case that Mrs Saxon failed to address it, as the evidence indicates that she did promptly involve outside agencies and the Claimant eventually accepted that she had in fact phoned him to discuss the matter shortly after the meeting of 22 March. It is also clear from the Claimant's own evidence that she had discussed with him whether or not the police would take further action and she also said, in oral evidence that she had advised him that if the police were in fact to take action, he would need, as the victim, to make a complaint personally. He denied that comment, but we prefer Mrs Saxon's evidence on this point. The Claimant also asserted that despite his concerns about KR's racial abuse, he had been forced by Mrs Saxon to work for a second week with KR. He pointed to his email of 12 March [101], written prior to commencing care of KR, saying that he only wished to work for one week with him, as evidence on this point, but we note that he did not, in his letter of complaint, reiterate such a limitation, or indeed subsequently. He provided no evidence, beyond his assertion, of any pressure being applied to him by Mrs Saxon, which allegation she denied.

(4) In respect of his complaints that Mrs Saxon had also failed to properly address his claims as to payment for rest breaks and health and safety, we note that firstly, the Claimant provided no evidence whatsoever of having raised either concern during his employment. Secondly, in respect of rest breaks, the Respondent's position was and is that there was no contractual entitlement to payment and finally, in respect of the health and safety allegation about the lock, we consider that matter within the automatic unfair dismissal claim (below).

9. For these reasons, therefore, the Claimant's claim of direct race discrimination is dismissed.

10. Automatic Unfair Dismissal subject to s.100 and/or 104 ERA. We deal briefly with this claim. Firstly, as stated above, there is no evidence, beyond the Claimant's assertion that he ever, during his employment, raised the issue as to whether a lock had been absent from his bedroom door. Mrs Saxon denied any such complaint being made, although she considered it possible that at the outset, there may not have been a functioning lock on the door, but crucially no specific complaint had been made by the Claimant on this point. That issue, therefore, cannot have formed part of Mrs Saxon's rationale for his dismissal. In any event, the wording of the Act requires this assertion to be the reason, or at least the principal reason, for the Claimant's dismissal and this cannot be the case, as, on the Claimant's own evidence, the principal reason was his race. For these reasons, therefore, this claim is also dismissed.

11. Harassment. The Respondent accepted that KR had racially abused the Claimant. The Claimant relies on s.109 Equality Act in respect of liability of the Respondent for this abuse, but KR was neither an employee, nor an agent of the Respondent and therefore this section is not engaged. He also sought to rely on s.112, as to the Respondent potentially aiding such acts of harassment, by requiring him to continue to work with KR. However, as already found, no such compunction was applied and on his own evidence, there were no further acts of harassment by KR. The Claimant was fully aware, prior to working with KR that he was generally abusive and foul-mouthed, but as there was no reference in the incident log to any past racial abuse, the Respondent cannot have alerted him in advance to that discrete possibility. We find therefore that the Respondent can have no liability for the racial abuse suffered by the Claimant and this claim is also dismissed.

12. Victimisation. The Respondent accepted that the Claimant's complaints about KR constituted a protected act. They categorically denied, however that his subsequent dismissal, reduction in hours and failure to pay night rates were because of that protected act. We concur, for the following reasons:

    (1) We have already set out above why we consider the Claimant was dismissed and had his hours reduced and which, without repetition, is clearly not because of any act of victimisation. The issue as to night pay predates the protected act and cannot therefore be causally linked to it.

    (2) The time lag between the protected act and the alleged detriments, six weeks, in the context of all the other issues that arose, as to general performance and training, indicates to us that the protected act formed no part of the Respondent's thinking at the time.

13. Failure to Make Reasonable Adjustments. Even were we to find that the Claimant was disabled at the relevant time, we dismiss this claim, for the following reasons:

    (1) In respect of the first PCP, that he be fit to provide necessary care for AJ and KR overnight, if they woke up, this PCP is accepted by the Respondent. However, the Claimant had provided no evidence whatsoever that the Respondent should have been aware of his claimed impairment of depression, which he said lead to him suffering a substantial disadvantage, in that being woken interfered with medication he took for that condition. As pointed out in the chronology, he made no reference to such condition in the medical questionnaire and Mrs Saxon's evidence, which we accept, was that she was completely unaware of any such condition. The Claimant asserted that she should have been aware, because he asked permission for time off for medical appointments, but she said that she certainly had no knowledge that any such appointment was for any mental health issue, thinking perhaps one such absence may have been for a dental appointment. The Claimant's medical records [385] indicate that during his employment, he had only one possibly-related appointment, for '*stress-related problems, in respect of work'* on 17 April, on which date he wasn't in fact working and would not therefore have needed to seek time off.

(2) In respect of the second PCP, the alleged requirement to assist AJ in and out of bed and in washing him (either by getting into a bath, or carrying out a standing wash) is denied by the Respondent. Mrs Saxon said that there was no requirement to 'manually handle' AJ and that it was expected of him that he could get in out of bed himself. As to bathing, again, for the short period that that process was engaged, there was again no expectation of manual handling. When it was clear that AJ could not use the bath, standing washing was implemented, for which she accepted, the Claimant would need to bend up and down. However, she had no information from the Claimant that he would not be capable of doing so, or that he would suffer a substantial disadvantage and there is no evidence, apart from the medical disclosure form that the Claimant had ever raised this as a potential issue. He will presumably have hand washed AJ daily during his shifts, over a three-month period, but never, until this claim, raised this issue before. The Claimant asserted that due to his references to taking medication, in particular pain killers, in the medical disclosure form that Mrs Saxon should have perceived therefore that bending up and down would be a problem for him, but we disagree, based on the clear record of his initial interview where he said that his past back condition had healed and would not affect his ability to work and that he '*had no lasting back problem'*. He also said in his evidence that provided he took his medication, he was fine. In those circumstances, it cannot be reasonable, therefore, to expect the Respondent to be on notice as to these alleged disabilities/impairments, or any substantial disadvantage as a consequence. This claim is also therefore dismissed.

14. Notice Pay. The Claimant fundamentally fails to understand the legal position in this respect. He was, although he doesn't seem to accept it, on a zero-hours contract and therefore there was no requirement on the Respondent to provide him with work, for which he could be paid. The Respondent met its contractual requirement to give him four weeks' notice, which he 'worked out', albeit that during that period no paying work was available to him. The Respondent indicated that he was free, if he wished, to take paid work elsewhere. The Respondent has therefore no liability for pay in lieu of notice.

15. Holiday Pay. The Respondent paid him for seven days' holiday, which they said was his entitlement, whereas, at the hearing, the Claimant, without providing any alternative calculation, said that his entitlement was for ten days. He was unable, in questioning, to adequately explain how he had arrived at that figure. He subsequently, after closing submissions, emailed the Tribunal with some additional documents in relation to this matter, but these are simply generic Gov.uk advice sheets on the calculation of holiday pay, but nothing to advance the evidence in respect of his own particular entitlement. The burden of proof being on the Claimant in this respect, this claim is therefore dismissed.

16. Conclusion. For these reasons, therefore, the Claimant's claims of direct race discrimination, harassment, victimisation, failure to make reasonable adjustments, failure to provide pay in lieu of notice and arrears of holiday pay, fail and are dismissed. As previously stated, the Claimant's claim in respect

of unpaid wages in respect of night working is stayed, pending the outcome in the Supreme Court of **Tomlinson-Blake v Mencap**.

Employment Judge O'Rourke

Date: 20 August 2020

Reasons sent to parties: 21 August 2020

FOR THE TRIBUNAL OFFICE